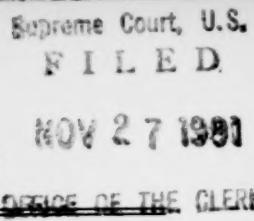


91-897

No. _____



In The
Supreme Court of the United States
October Term, 1991

CHRISTOPHER L. RHODES,

Petitioner,

vs.

CONTINENTAL CONVEYOR &
EQUIPMENT COMPANY,

vs.

LUMMUS INDUSTRIES, INC.,

Respondent.

**Petition For Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

CARTER MOREY
HARALSON, KINERK,
AND MOREY, P.C.
82 South Stone Avenue
Tucson, AZ 85701
(602) 792-4330
Counsel for Petitioner,
Counsel of Record



QUESTIONS PRESENTED

1. Did this Court overrule *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (U.S. 1962) in *Torres v. Oakland Scavenger Company*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285, *reh. den.* 110 S.Ct. 12 (1988), and hold in the latter case that the failure to cite the judgment or order appealed from in a notice of appeal is a jurisdictional bar?
2. Did the Ninth Circuit's decision to grant Appellee's Motion to Strike Petitioner's Opening Brief create a split in the Circuits as to the issue of whether the failure to designate the judgment or order appealed from is a jurisdictional bar?
3. Did the United States Court of Appeals for the Ninth Circuit err in granting Appellee's Motion to Strike Petitioner's Opening Brief?

LIST OF PARTIES

The parties to proceedings below were, and the parties to this Petition for Certiorari are:

PETITIONER:

Christopher RHODES, **Appellant below.**

RESPONDENTS:

LUMMUS INDUSTRIES, INC., **Appellee below.**

PARTY BELOW WHO IS NOT A PARTY TO THIS PROCEEDING:

Continental Conveyor & Equipment Co., **Defendant in the trial court, settled with Petitioner.**

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OPINIONS BELOW

The Order appealed from is reproduced in its entirety in the Appendix at 34.

JURISDICTION

Petitioner believes that jurisdiction is conferred on this Court by Title 28 U.S.C. § 1254(1) which states that cases in the Court of Appeals may be reviewed by the Supreme Court

By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of a judgment or decree;

and by Title 28 U.S.C. § 2101(e) which provides:

An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

CONSTITUTIONS AND STATUTES INVOLVED

Petitioner believes that no part of the United States Constitution, nor that of any state, is implicated in this Petition.

Federal Rule of Civil Appellate Procedure 3(c) provides:

Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in

the Appendix of Forms is a suggested form of notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

This cases involves the issue of whether the judgment-designation language of Rule 3(c) is a jurisdictional bar. The Ninth Circuit has held that it is, relying on *Torres* despite the language to the contrary in *Foman*.

This litigation has its genesis in December 17, 1985, when Petitioner Chris Rhodes was severely injured when his right hand and forearm became entrained in the roller blade assembly of a cotton roller gin at the Strebor Gin in Bowie, Arizona. As a result of the hand injury, Rhodes underwent medical surgeries and suffered functional and scarring injuries. Chris Rhodes brought suit against a number of Defendants, including Appellee, Lummus Industries, Inc. After the issues were joined and tried to a jury, the jury returned a verdict in favor of Chris Rhodes and against Lummus in the amount of \$1,000,000.00. (App. 4.) That verdict and subsequent Judgment was overturned by the District Court's granting to Appellee Lummus, Judgment n.o.v. and, conditionally, a new trial. (App. 3.)

Following the entry of judgment n.o.v. Petitioner filed several motions. (App. 8-16.) In an order dated June 20, 1990, and entered June 28, 1991, the District Court denied these motions. (App. 17.) Petitioner then timely filed his notice of appeal. (App. 20.) Shortly thereafter

Petitioner filed his Civil Docketing Statement with the United States Court of Appeals for the Ninth Circuit. (App. 22.) Once the transcript of the trial was available, Petitioner prepared and filed his Opening Brief. This brief covered all six issues contained in Petitioner's Civil Docketing Statement. (App. 30.) The issues briefed in Petitioner's brief were:

- 1) Whether Arizona would recognize an independent duty to warn in a products liability case;
- 2) Whether the District Court erred in granting summary judgment to Appellee on the issues of successor liability;
- 3) Whether there were sufficient facts adduced at trial to support a finding of proximate cause;
- 4) Whether the District Court erred in finding on its own motion that the nature of the danger was open and obvious;
- 5) Whether the verdict was excessive or the product of passion or prejudice; and
- 6) Whether Arizona's product liability Statute of Repose, A.R.S. § 12-551 was unconstitutional.

On May 29, 1991, Appellee below, Lummus Industries, filed a Motion to Strike Petitioner's Opening Brief on the grounds that the brief exceeded the scope of Petitioner's Notice of Appeal. On August 1, 1991, the Ninth Circuit granted Appellee's motion and limited Petitioner to the three issues defined in footnotes 1, 2, and 3 of the District Court's June 28, 1990 Order. In this Order the Ninth Circuit cited F.R.A.P. Rule 3(c), 28 U.S.C. as authority. (App. 33.) Petitioner and Appellee both filed

motions to reconsider. The Ninth Circuit denied each motion in Orders dated August 29, 1991. (App. 34, 36.)

As a result of the Ninth Circuit's decision to limit Petitioner to the three issues defined in the District Court's June 28, 1990 order, Petitioner filed a revised brief on only these three issues:

- 1) Whether Arizona would recognize an independent duty to warn in a products liability case;
- 2) Whether the District Court erred in granting summary judgment to Appellee on the issues of successor liability; and
- 3) Whether Arizona's product liability Statute of Repose, A.R.S. § 12-551 was unconstitutional. (App. 9.)

Petitioner now appeals the Ninth Circuit's August 29, 1991 Order denying its Motion to Reconsider its August 1, 1991 Order.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's ruling in its August 1, 1991 Order that the judgment-designating language of Rule 3(c) is a jurisdictional bar is inconsistent with this Court's holding in *Foman*.

In its Motion to Strike Petitioner's Brief, Appellee argued that under F.R.A.P. Rule 3(c), 28 U.S.C., because Petitioner filed a Notice of Appeal from the District Court Order signed June 20, 1990 (filed June 28, 1990), he was limited to appealing only those issues covered by that

Order. The Ninth Circuit, in its August 1, 1991 Order granted Appellee's motion and cited Rule 3(c) as authority. However, The Ninth Circuit's ruling, based on a narrow reading of Rule 3(c), was contrary to the decision in *Foman* in which this Court rejected the argument that the Notice of Appeal necessarily limits the scope of the appeal.

In *Foman*, this Court reviewed the decision of the Court of Appeals for the First Circuit to hold a Notice of Appeal invalid because it did not specify from what judgment the appeal was taken. This Court noted that the First Circuit should have treated the technically incorrect Notice of Appeal as ". . . an effective although inept, attempt to appeal from the judgment sought to be vacated." This was so because, ". . . petitioner's intention to seek review . . . was manifest." 371 U.S. at 181.

This Court in *Foman* recognized the inappropriateness of the holding of the Ninth Circuit's August 1, 1991 Order:

It is . . . entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' (Citation omitted) 371 U.S. at 181, 182.

In the case at bar, as in *Foman*, the intent to appeal the final judgment was manifest. Following entry of judgment n.o.v. by the District Court on May 21, 1990, Petitioner filed several motions. When read together the motions make it clear that Petitioner intended all along to appeal the final Judgment in the case.

Petitioner's *Renewed Application for Clarification of the Court's Ruling on the Constitutionality of A.R.S. § 12-551* states explicitly that Petitioner is attempting to ensure that this issue is preserved for appeal. (App. 8.) In the *Petition for Certification Order*, Petitioner indicated that he wanted the issues certified to the Arizona Supreme Court "to aid the Ninth Circuit Court of Appeals in the case. . . ." (App. 15.) Further, Petitioner's *Motion to Extend Time for Filing Notice of Appeal* asked the trial court for additional time to appeal from the May 21, 1990, Judgment n.o.v. The reason that Petitioner requested this extension was because there were three post-judgment motions before the trial court and Petitioner wanted to ensure that the trial court retained jurisdiction to act on these motions ". . . before Plaintiff is required to file a Notice of Appeal from the j.n.o.v." (App. 13.) Finally, in his *Civil Appeals Docketing Statement*, filed August 8, 1990, Petitioner listed the six issues to be raised on appeal that ultimately were raised. (App. 22.)

The inescapable conclusion from this sequence of pleadings is that Petitioner intended all along to appeal the May 21, 1990, Judgment, n.o.v.

Because the intent of Petitioner to appeal the May 21, 1990, Judgment n.o.v. was clear in the pleadings that

followed the entry of that Judgment, the Ninth Circuit erred in not applying *Foman* and in denying Appellee's Motion to Strike. This Court should correct this error.

II.

The Ninth Circuit's ruling in its August 1, 1991 Order that the judgment-designating section of Rule 3(c) is a jurisdictional bar is inconsistent with all other Circuits which have considered the matter.

In addition to the Ninth Circuit, seven circuits have addressed the question and not one has held that the failure to specify the judgment appealed from is jurisdictional; five have held contrary to Ninth Circuit and two have expressed no opinion.

The Fifth Circuit most recently took up the issue. In *Turnbull v. U.S.*, 929 F.2d 173 (1991), Turnbull appealed from an Order denying his Motion for New Trial rather than the final judgment. Relying on *Foman*, the Court noted, "This court has liberally construed Rule 3(c), holding that 'where the intent to appeal is . . . apparent and there is no prejudice to the adverse party,' the appeal is not jurisdictionally defective." 929 F.2d at 176, 177. Turning to *Torres* the Court pointed out:

The *Torres* Court did not, however, view its decision as inconsistent with its decision in *Foman*. . . . The Court distinguished *Foman* on the grounds that it dealt with the judgment-designation provision rather than the party-specification provision or Rule 3(c). (Citation omitted) *Id.* at 177.

In a earlier case, *Osterberger v. Relocation Realty Services Corp.*, 921 F.2d 72 (1991), the Fifth Circuit explained why *Torres* and *Foman* are not contradictory. According to that Court, it is the interaction of F.R.A.P. Rule 4 (requirement of filing Notice of Appeal within thirty days) and the party-designation provision of 3(c) that makes the party-designation requirement of the latter rule jurisdictional.

If a party does not comply with Rule 4, a Court of Appeals does not have jurisdiction. . . . But a party cannot circumvent the time requirements of Rule 4 by designating the wrong judgment if it is clear they intended to designate the right one. Thus, . . . *Torres* has no effect on the long line of cases that have held that an appeal erroneously taken from a denial of a motion . . . rather than from the underlying judgment, should be treated as an appeal from the judgment. (Citations omitted; emphasis added.) 921 F.2d at 74.

The Second Circuit is in harmony with the Fifth Circuit's interpretation of Rule 3(c). In *State Trading v. Assuranceforeningen Skuld*, 921 F.2d 409 (1990), the Court noted that:

While *Torres* held that the failure to comply with this [party-designation] requirement is a jurisdictional defect, it specifically noted that this holding did not alter the *Foman* principle in favor of finding compliance by liberally construing the rules. (Citation omitted) 921 F.2d at 413, 894 F.2d at 924.

The other circuits which have considered whether the judgment-designation portion of Rule 3(c) is jurisdictional: The *First Circuit* in *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1221 (1990) ("[The Court in *Torres*] took pains not to overrule *Foman v. Davis*. . . . The *Foman* Court was addressing the 'separate provision of Rule 3(c)' requiring that the judgments or orders appealed from be designated."); The *Third Circuit* in *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 858 (1990) (Liberally construing the judgment designation requirement of Rule 3(c) ". . . is consistent with the Supreme Court's pronouncement in *Torres*. . . ."); The *Fourth Circuit* in *Smith v. Galley*, 919 F.2d 893 (1990) (Informal brief does not satisfy the party-designation requirement of Rule 3(c); no comment on jurisdictional nature of judgment-designation requirement); The *Sixth Circuit* in *Minority Employees v. Tenn. Dept. of Emp. Sec.*, 901 F.2d 1327 (1990) (The use of *et al.* in caption does not meet the party-designation requirements of Rule 3(c); did not reach jurisdictional nature of judgment-designation requirement); and The *Seventh Circuit* in *Chaka v. Lane*, 894 F.2d 923, 924 (1990) ("*Torres* did not overrule *Foman*."). The clear weight of the holdings is contrary to the Ninth Circuit's assertion that the judgment-designation requirement of Rule 3(c) is jurisdictional.

The Ninth Circuit's August 1, 1991 Order has created a split in the circuits as to whether *Torres* overrules *Foman* on the issue of whether the judgment-designation Rule 3(c) is jurisdictional. This Court should accept this Petition to resolve this split.

III.

It would be inequitable to deny Petitioner the right to appeal all six issues contained in his original Opening Brief.

In his *Civil Appeals Docketing Statement*, filed August 8, 1990, Petitioner listed the six issues to be raised on appeal that ultimately were raised. (App. 8.) Appellee thus had notice as of that date that Petitioner intended to pursue these six issues on appeal. In spite of this, Appellee made no effort to protest the technical deficiency of Petitioner's Notice of Appeal for ten months. In filing a Motion to Strike only after Petitioner had filed his Opening Brief on the six issues is not fair. It is contrary to the spirit of the Federal Rules of Appellate Procedure and the Ninth Circuit was in error to hold that Petitioner could brief but three issues.

CONCLUSION

Petitioner respectfully request that this Court issue a writ of certiorari to review the decision of the Court below.

Respectfully submitted,

CARTER MOREY
HARALSON, KINERK,
AND MOREY, P.C.
82 South Stone Avenue
Tucson, AZ 85701
(602) 792-4330
Counsel for Petitioner
Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES)	
Plaintiff/Appellant,	)	U.S. Court
vs.	)	of Appeals
	)	Docket No. 90-16033
CONTINENTAL CONVEYORS,	)	Lower Court
Defendant,	)	Docket No.
vs.	)	CV-86-616-
LUMMUS INDUSTRIES, INC.,	)	TUC-RMB
Defendant/Appellee.	)	Arizona (Tucson)
)	

APPELLANT'S OPENING BRIEF

Carter Morey
Haralson, Kinerk & Morey, P.C.
82 South Stone Avenue
Tucson, Arizona 85701
(602) 792-4330
Attorney for Plaintiff/Appellant

* * *

STATEMENT OF THE CASE

The Complaint in this matter was filed on October 30, 1986, followed by an Amended Complaint on July 27, 1987. (R. 1, 12.) Answers were timely filed, and the issues were joined. (R. 15, 16.). On May 26, 1988, Appellee Lummus filed its Motion for Summary Judgment on the issue of successor liability. (R. 45, 46.) Thereafter, on June 13, 1988, Lummus moved for summary judgment on strict liability. (R. 45, 46.)

Co-Defendant Continental Conveyor and Equipment responded to the motion on successor liability on June 13, 1988, claiming that of the two Defendants, Lummus was the successor. (R. 47, 48.) Appellant opposed the summary judgment motion on successor liability on June 27, 1988. (R. 54, 55.) Various replies were duly submitted.

On September 30, 1988, the trial court denied the motion on successor liability, but granted the motion on strict liability. (R. 101.) Appellant filed a Motion for Reconsideration of this Order on February 17, 1989 (R. 114), and after a Reply and argument, the trial court amended its Order, essentially reversing the previous Order by granting the successor motion and denying the strict liability motion. (R. 117.)

A Motion to Clarify was filed by Lummus on March 20, 1989 (R. 119), responded to on March 29, 1989 (R. 121), and the trial court entered its Order clarifying the issues for trial on April 4, 1989 (R. 124). This matter went to jury trial on June 1, 1989. (R. 164.) On June 16, 1989, the jury returned a verdict in the sum of \$1,000,000.00 for Appellant. (R. 164.)

The Judgment was entered on June 30, 1989, after reduction of the verdict by the settlement amount paid by Continental Conveyor and Equipment Co. (R. 202.) Appellee Lummus submitted a Motion for Judgment N.O.V., together with a Motion for New Trial on July 18, 1989. (R. 212, 213.) They were duly opposed by Appellant on July 20, 1989. (R. 215, 216.) The replies were timely filed. (R. 222, 223.) On December 4, 1989, the hearing was held. (R. 246.)

On May 2, 1990, the trial court granted the Motion for Judgment N.O.V., and conditionally granted a part of the new trial motion on damages. (R. 248.) The final Judgment was entered on May 21, 1990. (R. 252.) In the interim, Appellant moved for relief from the granting of the Judgment N.O.V. on May 17, 1990. (R. 251.) Lummus responded. (R. 252.) This relief was denied on June 28, 1990. (R. 265.) In the same Order, Appellant's time for appeal was extended, and the timely appeal was filed July 17, 1990. (R. 268.) On May 29, 1991 Appellee Lummus Industries filed a Motion to Strike Opening Brief, or Alternatively, Motion for Summary Affirmance. Appellant opposed the Motion. On August 1, 1991, this Court granted Appellee's Motion and ordered that Appellant submit his Opening Brief, limited to the three issues defined in footnotes 1, 2, and 3 of the District Court's June 28, 1991, Order. On August 9, 1991, Appellant filed a Motion to Reconsider. On August 9, 1991, Appellee filed a Motion for Clarification/Motion to Reconsider this Court's August 1, 1991 Order. Appellee filed a response to Appellant's Motion to Reconsider on August 26, 1991. On August 29, 1991, Appellant was informed by telephone by Donna Gilmore that his August 9, 1991 Motion had been denied and that his Opening Brief was due in San Francisco that same day.

App. 4

HARALSON, KINERK & MOREY, P.C.

ATTORNEYS AT LAW

82 SOUTH STONE AVENUE

TUCSON ARIZONA 85701

(602) 792-4330

Carter Morey
State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES,)	
a single man,)	
Plaintiff,)	NO. CIV 86-616 TUC
vs.)	RMB
	[JMF]
CONTINENTAL CONVEYOR)	
& EQUIPMENT COMPANY,)	JUDGMENT
INC., a Delaware corporation,))	
et al.,)	(Filed Jun. 30, 1989)
Defendants.)	
)

This case having been tried in open court, and the jury having received evidence, and returning their verdict on June 15, 1989, and finding as follows:

1. Full damages in the amount of \$1,000,000.00.
2. Plaintiff, Christopher Rhodes' fault - zero.
3. Defendant, Lummus Industries' fault - ten percent (10%).

App. 5

4. Continental Conveyor and Equipment, Hardwicke-Etter, Strebor, Roberts Farms' fault - ninety percent (90%).

The Court having been advised of a settlement between Plaintiff and Continental Conveyor and Equipment Company in the amount of Two Hundred and Fifty Thousand Dollars (\$250,000.00), and the Court having acknowledged the fact of the settlement during trial, the Court orders judgment in favor of the Plaintiff, Christopher Rhodes, and against Defendant, Lummus Industries, Inc., in the amount of One Million Dollars (\$1,000,000.00), and further orders that at the time the settlement between Continental Conveyor and Equipment Company and Plaintiff is concluded, the Judgment of One Million Dollars (\$1,000,000.00) is reduced to Seven Hundred and Fifty Thousand Dollars (\$750,000.00). Plaintiff is further awarded his costs. This Judgment will accrue interest at the statutory rate of interest from this date forward.

Dated this 30 day of June, 1985.

/s/ James Fitzgerald

Honorable James Fitzgerald
Judge of the
District Court

Copy of the foregoing mailed
this day of , 1989,
to:

App. 6

Brian Burt
Teilborg, Sanders & Parks
Teilborg, Sanders & Parks
3030 N. Third Street, Suite 1300
Phoenix, Arizona 85012
Attorney for Defendant LUMMUS

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES,
Plaintiff,

**AMENDED
JUDGMENT IN A
CIVIL CASE**

V.

LUMMUS INDUSTRIES, INC.,
Defendant.

CASE NUMBER:
CIV 86-616-TUC-
RMB (JMF)

- [] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- [XXX] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to Order of Judgment Notwithstanding the Verdict filed May 2, 1990, the JUDGMENT entered in this matter on June 30, 1989, is AMENDED as follows:

IT IS ORDERED and ADJUDGED that JUDGMENT is entered in favor of the Defendant LUMMUS INDUSTRIES, Inc., and against the Plaintiff.

May 21, 1990

Date

RICHARD H. WEARE

Clerk

/s/ Virginia Abeyta

(By) Deputy Clerk

MAY 23 1990

HARALSON, KINERK & MOREY, P.C.

ATTORNEYS AT LAW

82 SOUTH STONE AVENUE

TUCSON ARIZONA 85701

(602) 792-4330

Carter Morey

State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES, a single man, Plaintiff,)NO. CIV 86-616)TUC RMB) vs. CONTINENTAL CONVEYOR & EQUIPMENT COMPANY, INC., a Delaware corporation, et al., Defendants.)PLAINTIFF'S)RENEWED)APPLICATION FOR)CLARIFICATION OF)THE COURT'S RULING)ON THE)CONSTITUTIONALITY)OF A.R.S. §12-551	[JMF]
---	--	---	-------

Pursuant to the Court's Order of May 2, 1990, Plaintiff renews his application for clarification on the constitutionality of A.R.S. § 12-551, Arizona Products Liability Statute of Repose. Plaintiff has reviewed the Court's Minute Entries and does not find a specific ruling on the constitutionality of A.R.S. § 12-551. The trial transcripts have been ordered, but not yet received. Plaintiff did make the constitutionality of A.R.S. § 12-551 an issue in the Objections and Exceptions to offered jury instructions per the Court's Order.

App. 9

Plaintiff filed Objections and Exceptions based on the Statute of Repose preventing Plaintiff from getting products liability instructions. (See Minute Entry, June 15, 1989, and Objections and Exceptions to the Jury Instructions, June 26, 1980.)

The Court did rule that the cotton gin that Rhodes was injured on was manufactured at least twelve years earlier and that the Statute of Repose applied. Plaintiff now requests a specific ruling that the Statute of Repose is unconstitutional. Plaintiff realizes that *Bryant v. Continental Conveyer & Equipment Co., Inc.*, (1988) 156 Ariz. 193, 751 P.2d 509 (a predecessor case to Rhodes in which the same lawyers participated), holds the statute to be constitutional.

Although the transcript of argument, Minute Entries and jury instruction Objections and Exceptions may be sufficient to preserve and present this issue for appeal, Plaintiff requests the Court's ruling to be sure.

Dated this 1st day of June, 1990.

HARALSON, KINERK &
MOREY, P.C.

/s/ Carter Morey
Carter Morey
Attorney for Plaintiff

Copy of the foregoing mailed
this 1 day of June, 1990,
to:

EXHIBIT 1

CIVIL MINUTES

Civil Case No. CIV-86-616-T-RMB (JMF)

Date: June 14, 1989

Title: Christopher Rhodes vs. Continental Conveyor

PRESENT:

HON. James M. Fitzgerald JUDGE

Betty M. Solis

Carol Post

Deputy Clerk

Court Reporter

ATTORNEY(S) FOR

ATTORNEY(S) FOR

PLAINTIFF(S)

DEFENDANT(S)

Carter Morey

Brian Burt & Richard Kent

for Lummus

X JURY TRIAL COURT TRIAL (Filed June 15, 1989)

 Jury impaneled and sworn (Jury list on reverse)

 Jury/trial held, 7th day.

 Witnesses sworn and examined (under Rule)
(see separate list)

 Exhibits marked for I.D. (admitted into evidence) (see separate list)

X Case cont. to: 9:00 a.m., Thurs., June 15, 1989 for
further deliberation.

Jury retires to deliberate at: 12:05 p.m. on Wed., June 14, 1989

JURY RETURNS VERDICT/COURT FINDS: _____

Order Mistrial Declared.

Motion for Directed Verdict GRANTED on behalf of _____

MATTER TAKEN UNDER ADVISEMENT

Other: Plaintiff's counsel orally moves for a Motion to preclude defendant Lummus Industries mention either Workman's Compensation or OSHA Regulations in their closing argument.

(CONTINUED ON REVERSE)

Copies issued to: Morey, Burt, Kent, RMB, JMF

LIST OF JURORS

- | | |
|-------------------------|----------------------------|
| 1. <u>Paava Oflund</u> | 4. <u>Bernice Anderson</u> |
| 2. <u>Don Moore</u> | 5. <u>Hyla Arnold</u> |
| 3. <u>Sandra Putman</u> | 6. <u>Phyllis Wheeler</u> |

M. Jane Kiserschmidt _____

Alternate

Alternate

CONTINUED FROM FRONT

It is ordered that Defendant Lummus Industries is hereby precluded from mentioning Workmen's Compensation or any other insurance in their closing argument.

It is further ordered that Defendant Lummus Industries is hereby precluded from mentioning OSHA Regulations in their closing argument.

It is further ordered that all admitted exhibits begrudging of any mention of Workmen's Compensation or any other insurance and of any mention of any OSHA Regulations prior to the admitted exhibits being submitted to the Jury.

The Court rejects the exceptions of the Jury Instructions and instructs all counsel to file with the Clerk their exceptions in typewritten form to be made a part of the record.

HARALSON, KINERK & MOREY, P.C.

ATTORNEYS AT LAW

82 SOUTH STONE AVENUE

TUCSON ARIZONA 85701

(602) 792-4330

Carter Morey
State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES,)	
a single man,)	
Plaintiff,	)	NO. CIV 86-616 TUC
vs.	)	RMB
CONTINENTAL CONVEYOR	)	[JMF]
& EQUIPMENT COMPANY,	)	MOTION TO
INC., a Delaware corporation,	)	EXTEND TIME FOR
et al.,	)	FILING NOTICE OF
Defendants.	)	APPEAL
)	

Pursuant to Federal Rules of Appellant Procedure, Rule 4(a)(5), Plaintiff moves that this Court to extend the time for filing his Notice of Appeal from the Amended Judgment entered May 21, 1990, until thirty days after this Court decides motions presently before it.

Defendant's j.n.o.v. was entered on May 21, 1990. Pursuant to Rule 4(a)(4) Plaintiff's Notice of Appeal must be filed thirty days after j.n.o.v. entry, June 20, 1990.

Rule 4 contemplates good cause extension of time for filing Notices of Appeal. Plaintiff has good cause for an extension because there are three motions before the Court: 1) Motion for Certification; 2) Motion for Relief of Judgment or in the Alternative Motion for Reconsideration; 3) Motion for Clarification of Ruling on A.R.S. § 12-551 Statute of Repose. This Motion is made so that this Court retains jurisdiction to decide these Motions before Plaintiff is required to file a Notice of Appeal from the entry of j.n.o.v.

Respectfully submitted this 1st day of June, 1990.

|

HARALSON, KINERK & MOREY, P.C.

/s/ Carter Morey

Carter Morey

Attorneys for Plaintiff

Copy of the foregoing mailed
this 1 day of June, 1990,
to:

Brian Burt
Teilborg, Sanders & Parks
3030 N. Third Street, Suite 1300
Phoenix, Arizona 85012
Attorney for Defendant LUMMAS

HARALSON, KINERK & MOREY, P.C.

ATTORNEYS AT LAW

82 SOUTH STONE AVENUE

TUCSON ARIZONA 85701

(602) 792-4330

Carter Morey
State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES,)	
a single man,)	
Plaintiff,	)	NO. CIV 86-616 TUC
vs.	)	RMB
)	
CONTINENTAL CONVEYOR	)	PETITION FOR
& EQUIPMENT COMPANY,	)	CERTIFICATION
INC., a Delaware corporation,	)	ORDER
et al.,)	
Defendants.)	

Plaintiff petitions this Court, pursuant to A.R.S. § 12-1861, *et seq.*, to certify the attached Order to the Arizona Supreme Court. The Court has removed Plaintiff's theories on successor corporation, independent duty to warn, and strict products liability. Plaintiff submits that these issues are now ripe for determination by the Arizona Supreme Court.

Following a jury verdict and judgment in Plaintiff's favor and against Lummus Industries, Inc., this Court granted Lummus j.n.o.v. because Plaintiff succeeded on

untested legal theories. Until the Arizona Supreme Court or state legislature offers further guidance, Plaintiff's action will be severely prejudiced. The recent decision in *Torres v. Goodyear Tire & Rubber Co.*, 51 Ariz. Adv. Rep. 13 (1990) (*Torres III*), is the indication from the Arizona Supreme Court of extending tort liability.

Torres was decided twice by the Ninth Circuit Court of Appeals before the Arizona Supreme Court finally decided the issue. To aid the Ninth Circuit Court of Appeals in this case and to avoid further delay and cost, the issues of successor corporation, independent duty to warn, and the constitutionality of the Statute of Repose should be decided by the Arizona Supreme Court. Plaintiff requests his Petition for Certification be granted.

Dated this 1st day of June, 1990.

HARALSON, KINERK & MOREY, P.C.

/s/ Carter Morey

Carter Morey

Attorney for Plaintiff

Copy of the foregoing mailed
this 1 day of June, 1990,
to:

Brian Burt
Teilborg, Sanders & Parks
3030 N. Third Street, Suite 1300
Phoenix, Arizona 85012
Attorney for Defendant LUMMAS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES,)	
a single man,)	
Plaintiff,	)	Case No.
vs.	)	CIV 86-616
CONTINENTAL CONVEYOR &	)	TUC RMB [JMF]
EQUIPMENT COMPANY, INC.,	)	ORDER
a Delaware corporation,)	
LUMMUS INDUSTRIES, INC.,	)	(Filed Jun. 28, 1990)
a Georgia corporation,)	
Defendants.)	
<hr/>		

Plaintiff's Motion For Relief Of Judgment; Or, In The Alternative Motion For Reconsideration is DENIED. The certified question answered by the Arizona Supreme Court in *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939 (Ariz. 1990), and the Ninth Circuit's conforming decision, *Torres v. Goodyear Tire & Rubber Co.*, No. 87-2062, slip op. (9th Cir. Apr. 13 1990), were both available to and considered by me before I entered my order of May 2, 1990. Nothing in those decisions mandates legal conclusions different from those I have made regarding the duty to warn based on theories of negligence.

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As to points two¹ and three², plaintiffs Petition For Certification Order is DENIED. As for point one³,

¹ Point two being:

Whether a corporation (Lummus Industries, Inc.) that acquires significant property interests of a prior corporation (including critical patents) and then manufactures an essentially identical product (high-capacity roller gin) and continues to maintain and service the predecessors' cotton gins has an independent duty to warn of the prior corporation's defective product?

Plaintiff's proposed certification order at 2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

² Point three being:

Whether the twelve year Statute of Repose limitations portion of A.R.S. § 12-551 is unconstitutional under Article 18, Section 6 under the due process/equal protection divisions of the Arizona Constitution when the machine involved in the injury was distributed for use more than twelve years prior to the injury.

Plaintiff's proposed certification order at 2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

³ Point one being:

Whether a corporation (Lummus Industries, Inc.) that acquires significant property interests of a prior corporation (including critical patents) and then manufactures an essentially identical product (high-capacity roller gin) and continues to maintain and service the predecessors' cotton gins may be liable as a successor corporation under strict liability and/or negligence for a defective and unreasonably dangerous product?

Plaintiff's proposed certification order at 1-2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

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plaintiff should make his application to Chief Judge Bilby since Judge Bilby made the substantive ruling on the issue of successor liability.

Plaintiff's Renewed Application For Clarification Of The Court's Ruling On The Constitutionality Of A.R.S. § 12-551 is DENIED.

Good cause showing, plaintiff's Motion To Extend Time For Filing Notice Of Appeal is GRANTED. Plaintiff shall have until July 20, 1990, to file his notice of appeal.

IT IS SO ORDERED.

DATED this 20th day of June, 1990, at Anchorage, Alaska.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

HARALSON, KINERK & MOREY, P.C.

ATTORNEYS AT LAW

82 SOUTH STONE AVENUE

TUCSON ARIZONA 85701

(602) 792-4330

Carter Morey
State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES,)	
a single man,)	
Plaintiff,)	NO. CIV 86-616 TUC
vs.)	RMB
	[JMF]
CONTINENTAL CONVEYOR)	
& EQUIPMENT COMPANY,)	NOTICE OF APPEAL
INC., a Delaware corporation,))	
et al.,)	
Defendants.)	
)
)

NOTICE IS HEREBY GIVEN that Plaintiff, CHRISTOPHER L. RHODES, appeals to the United States Court of Appeals for the Ninth Circuit, from the Order entered in this action on the 20th day of June, 1990; that Order extended Rhodes' time for filing a Notice of Appeal until July 20, 1990.

Dated this 16 day of July, 1990.

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HARALSON, KINERK & MOREY, P.C.

/s/ Carter Morey

Carter Morey

Attorney for Plaintiff

Copy of the foregoing mailed
this 16 day of July, 1990,
to:

Brian Burt
Teilborg, Sanders & Parks
3030 N. Third Street, Suite 1300
Phoenix, Arizona 85012
Attorney for Defendant LUMMAS

P.O. Box 547
San Francisco, CA 94101

Court of Appeals
Docket Number:
90-16033

YOU MUST FILE AN ORIGINAL AND ONE COPY OF THIS FORM WITH THE CLERK OF THIS COURT WITHIN 14 CALENDAR DAYS OF THE DATE THE FORM IS SENT BY THE CLERK. YOU MUST ATTACH TO THE ORIGINAL AND TO THE COPY OF THIS FORM (1) A COPY OF THE JUDGMENT OR ORDER APPEALED FROM, (2) A COPY OF ANY OPINION OR FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE JUDGMENT OR ORDER, AND (3) PROOF OF SERVICE ON OPPOSING COUNSEL.

CIVIL APPEALS DOCKETING STATEMENT

Case Name: Rhodes v. Continental Conveyor & Equipment & Lummus

District Court/Agency: US District Court for District of Arizona; Tucson

District Court/Agency Docket No.: 86-616

District Judge: Fitzgerald

Party filing appeal/petition: Plaintiff Rhodes

)

A. Timeliness of Appeal or Petition for Review of Enforcement:

- (1) Date of entry of judgment or order: 06-30-89
#202
- (2) Service date of any post-judgment motion (other than motion for fees and costs): 07-20-89
- (3) Date of entry of order deciding post-judgment motion: 05-22-90

(4) Date notice of appeal or petition filed: 07-17-90

(5) Last day for filing appeal or petition: 07-20-90

(6) Authority fixing time limit for filing appeal or petition:

Fed. R. App. P. 4(a)(1) _____ Fed. R. App. P. 4(a)(4) _____

Fed. R. App. P. 4(a)(2) _____ Fed. R. App. P. 4(a)(5) _____

Fed. R. App. P. 4(a)(3) _____ Other Court order – dated
06-28-90

Appeal from District Court:

(1) Is the order appealed from a final order (i.e., does it dispose of the action as to *all* claims by *all* parties)? X

(2) If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment in accordance with Fed. R. Civ. P. 54(b)? _____

(3) If not final, is the order appealable as the grant or denial of an injunction under 28 U.S.C. § 1252(a)(1)? _____

(4) If none of the above applies, what is the basis for appellate jurisdiction? _____

Review of Agency Decision: If the appeal is from an agency decision, what statute or other authority grants this court power to review that decision?

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(X) Damages:

amount sought \$1,000,000.00 amount granted
\$1,000,000.00

- () Injunctive Relief: () preliminary () permanent
() granted () denied
- () Declaratory Relief: () granted () denied
- () Attorney Fees: amount sought \$ _____ amount
granted \$ _____
- () Other (specify) _____
-

Nature of Disposition below:

- () Bench Trial () Dismissal:
(X) Jury Verdict () Lack of Jurisdiction
() Summary Judgment () Failure to State a Claim
() Grant/denial of () Failure to Prosecute
Injunction () Other _____
() Default Judgment (X) Other Order granting judg-
() Agency Order ment notwithstanding the verdict.
Conditional new trial on damages
if JNOV reversed or remanded
-

Length of Trial or Hearing:

Equivalent of eight (8) full days

Preparation of Reporter's Transcript:

- (1) Do you intend to order any portion of the reporter's transcript for the appeal? Yes X No _____
- (2) Have you filed the transcript designation and order form in the district court? Yes _____ No X

Have you made arrangements for payment with the court reporter? Yes X No _____

(3) Estimated date of completion of transcript (if known): _____

Brief Description of the Nature of the Action and the Result Below:

Rhodes suffered injuries to his right arm while working at a cotton gin. The gin was manufactured by Hardwick Etter (H-E). H-E was sold out to Continental Conveyor and Equipment Co. (CCE), then H-E disbanded. CCE later sold its patents and all interests to the H-E gin Lummus. Plaintiffs pursued negligence and products liability action against CEE [sic] and Lummus.

During Pre-trial proceedings, Plaintiffs' issues were narrowed considerably. The issue left for trial was whether Lummus and CCE was liable under theories of negligence or strict products liability for failing to warn of predecessors unreasonably dangerous cotton gin. Pursuant to a settlement agreement, Defendant CCE was dismissed and Rhodes pursued Lummus.

SEE ATTACHED SHEET

3. During trial, Plaintiffs were further narrowed to a negligent independent duty to warn. The jury returned a verdict for Rhodes in the amount of \$1,000,000.00. The setoff of \$250,000.00 between CCE-Plaintiff reduced the verdict to \$750,000.00.

4. The court in post-trial motions granted JNOV. The JNOV was based on the lack of Arizona authority on independent duty to warn. The court further found the danger obvious. In addition, Rhodes damages were not proximately related to Lummus' failure to warn (i.e., even with a warning, Rhodes injuries would have occurred.) A

App. 26

conditional new trial was granted on damages if the NJOV [sic] is vacated or reversed. The trial court believes \$1,000,000.00 is excessive.

Standard of Appellate Review (Specify the proper standard of review to be applied by the court for each issue to be raised, citing relevant authority):

See attached.

Do you believe that settlement is feasible in this case? Yes
X No ____

Why or why not?

The liability exposure has been realistically assessed by a jury.

Would a prebriefing conference be useful in this case? Yes
X No ____

Why or why not?

To narrow down the issues and record for the appellate Court's convenience.

I.

Issues to be raised on appeal:

1. Whether Lummus has an independent duty to warn?
2. Whether Lummus is a successor corporation?
3. Whether Arizona's statute of repose is constitutional?
4. Whether the damages award by the jury is excessively high?
5. Whether the cotton gin is an open and obvious danger?
6. Whether Lummus' failure to warn proximately caused Rhodes' damages?

J.

Standard of review per issue and authority:

1. Independent duty to warn: In reviewing a JNOV the evidence is viewed in light most favorable to non-moving party. The JNOV must be the only reasonable conclusion. *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th CA, 1988).
2. Successor corporation: A grant of summary judgment is reviewed de novo. *Torres v. Goodyear Tire & Rubber Co., Inc.*, 857 F.2d 1293 (9th CA, 1988).
3. Statute of repose: the statute of repose is reviewed under strict scrutiny as affecting a fundamental right. *Davis v. Dow Chemical Corp.*, 819 F.2d 231 (9th CA, 1987).
4. Damages: The appellate court reviews a new trial on bases of whether the trial court abused its discretion. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d

1001 (9th CA, 1985); Cert den 474 US 1059, 88 L Ed 2d 778, 106 S Ct 802.

5. Obvious danger: Review of JNOV, see # 1 above.
6. Proximate cause: Review of JNOV, see # 1 above.

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Client Rhodes, Christopher L.

Attorney Richard Kent Telephone 602-230-5600

Firm Teilborg, Sanders & Parks, P.C.

Address 3030 North Third Street, Suite 1300
Phoenix, Arizona 85012-3039

Client _____

Attorney _____ Telephone _____

Firm _____

Address _____

Client _____

(list additional counsel on separate sheet if
necessary)

Attorney of Appellant (if pro se) Filing Docketing Statement

Name Carter Morey Telephone (602) 792-4330

Firm HARALSON, KINERK & MOREY, P.C.

Address 82 South Stone Avenue

Tucson, Arizona 85701

Check one: (X) Attorney () Appellant pro se

/s/ Kenneth Lee August 8, 1990
Signature Date

Kenneth Lee, for Carter Morey

If this is a joint statement by multiple appellants, add the names and addresses of other counsel on an additional sheet accompanied by a indication that they concur in the filing of this statement.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES)	
Plaintiff/Appellant,	)	U.S. Court
vs.	)	of Appeals
CONTINENTAL CONVEYORS,	)	Docket No. 90-16033
Defendant,	)	Lower Court
vs.	)	Docket No. CV-
LUMMUS INDUSTRIES, INC.,	)	86-616-TUC-RMB
Defendant/Appellee.)	Arizona (Tucson)

APPELLANT'S OPENING BRIEF

Carter Morey
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82 South Stone Avenue
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(602) 792-4330
Attorney for Plaintiff/Appellant

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* * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES,)
Plaintiff-Appellant,) No. 90-16033
vs.) DC#
CONTINENTAL CONVEYORS,) CV-86-0616-RMB
Defendant,) Arizona (Tucson)
vs.) ORDER
LUMMUS INDUSTRIES, INC.,) (Filed Aug. 1, 1991)
Defendant-Appellee.)
_____)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to strike appellant's opening brief is granted. *See Fed. R. App. P. 3(c).* Appellee's alternative motion for summary affirmance is denied.

Within 28 days of the date of this order, appellant shall file a new opening brief. Appellant's brief shall be limited to the issues defined in footnotes 1, 2, and 3 of the district court's June 28, 1990 order. The remainder of the briefing schedule shall be as set forth in Fed. R. App. P. 31(a). Failure to comply with this order may result in dismissal of this appeal pursuant to 9th Cir. R. 42-1.

MoCal 7/30/91

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES,)
Plaintiff-Appellant,)
vs.	) No. 90-16033
CONTINENTAL CONVEYORS,	) DC#
Defendant,	) CV-86-0616-RMB
vs.	) Arizona (Tucson)
LUMMUS INDUSTRIES, INC.,	) ORDER
Defendant-Appellee.	) (Filed Aug. 29, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellant's motion to reconsider is denied. No further motions to reconsider will be entertained.

MoCal 7/30/91 (Mem 8/91)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES,)
Plaintiff-Appellant,)
vs.	) DC#
CONTINENTAL CONVEYORS,	) CV-86-0616-RMB
Defendant,	) Arizona (Tucson)
vs.	) ORDER
LUMMUS INDUSTRIES, INC.,	) (Filed Aug. 29, 1991)
Defendant-Appellee.)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to reconsider or clarify is denied. Appellee is reminded that the panel that considers this appeal on the merits has the discretion to decide whether certain orders or issues are properly before it. The briefing schedule established in the court's August 1, 1991 order shall remain in effect.

MoCal 7/30/91 (Mem 8/91)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES,)
Plaintiff-Appellant,	) No. 90-16033
vs.	) DC#
CONTINENTAL CONVEYORS,	) CV-86-0616-RMB
Defendant,	) Arizona (Tucson)
vs.	) ORDER
LUMMUS INDUSTRIES, INC.,	) (Filed Aug. 29, 1991)
Defendant/Appellee.)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to reconsider or clarify is denied.
No further motions to reconsider will be entertained.

MoCal 7/30/91 (Mem 8/91)
